



## **DEPARTMENT OF TRANSPORTATION**

### **Federal Motor Carrier Safety Administration**

#### **49 CFR Part 385**

**[Docket No. FMCSA-2021-0063]**

**RIN 2126-AC40**

#### **Incorporation by Reference; North American Standard Out-of-Service Criteria; Hazardous Materials Safety Permits**

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** FMCSA amends its Hazardous Materials Safety Permits regulations to incorporate by reference the updated Commercial Vehicle Safety Alliance (CVSA) handbook containing inspection procedures and Out-of-Service Criteria (OOSC) for inspections of shipments of transuranic waste and highway route controlled quantities of radioactive material. The OOSC provide enforcement personnel nationwide, including FMCSA's State partners, with uniform enforcement tolerances for inspections. Through this rule, FMCSA incorporates by reference the April 1, 2021, edition of the handbook.

**DATES:** Effective [Insert date 60 days after date of publication in the FEDERAL REGISTER]. The incorporation by reference of the material described in the rule is approved by the Director of the Federal Register as of [Insert date 60 days after date of publication in the FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Mr. José Cestero, Vehicle and Roadside Operations Division, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE, Washington, DC 20590-0001, (202) 366-5541, [jose.cestero@dot.gov](mailto:jose.cestero@dot.gov). If you have questions on viewing or submitting material to the docket, contact Dockets Operations, (202) 366-9826.

## **SUPPLEMENTARY INFORMATION:**

This final rule is organized as follows:

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### **I. AVAILABILITY OF RULEMAKING DOCUMENTS**

To view any documents mentioned as being available in the docket, go to <https://www.regulations.gov/docket/FMCSA-2021-0063/document> and choose the document to review. To view comments, click this final rule, then click “Browse Comments.” If you do not have access to the internet, you may view the docket online by visiting Dockets Operations at U.S. Department of Transportation, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.

### **II. EXECUTIVE SUMMARY**

This final rule updates an incorporation by reference found at 49 CFR 385.4(b)(1) and referenced at § 385.415(b). The provision at § 385.4(b)(1) currently references the April 1, 2019, edition of CVSA’s handbook titled “North American Standard Out-of-

Service Criteria and Level VI Inspection Procedures and Out-of-Service Criteria for Commercial Highway Vehicles Transporting Transuranics and Highway Route Controlled Quantities of Radioactive Materials as defined in 49 CFR Part 173.403.” The CVSA handbook contains inspection procedures and Out-of-Service Criteria (OOSC) for inspections of shipments of transuranic waste and highway route controlled quantities of radioactive material. The OOSC, while not regulations, provide enforcement personnel nationwide, including FMCSA’s State partners, with uniform enforcement tolerances for inspections. The material is available, and will continue to be available, for inspection at the FMCSA, Office of Enforcement and Compliance, 1200 New Jersey Avenue SE, Washington, DC 20590 (Attention: Chief, Compliance Division) at (202) 366-1812. The document may be purchased from the Commercial Vehicle Safety Alliance, 6303 Ivy Lane, Suite 310, Greenbelt, MD 20770, telephone (301) 830-6143, [www.cvsa.org](http://www.cvsa.org).

Twenty-one updates distinguish the April 1, 2021, handbook edition from the 2019 edition. The updates are all described in detail in the July 6, 2021, notice of proposed rulemaking (NPRM) for this rule (86 FR 35445–47). The incorporation by reference of the 2021 edition does not impose new regulatory requirements.

### **III. LEGAL BASIS FOR THE RULEMAKING**

Congress has enacted several statutory provisions to ensure the safe transportation of hazardous materials in interstate commerce. Specifically, in provisions codified at 49 U.S.C. 5105(d), relating to inspections of motor vehicles carrying certain hazardous material, and 49 U.S.C. 5109, relating to motor carrier safety permits, the Secretary of Transportation is required to promulgate regulations as part of a comprehensive safety program on hazardous materials safety permits. The FMCSA Administrator has been delegated authority under 49 CFR 1.87(d)(2) to carry out the rulemaking functions vested in the Secretary of Transportation. Consistent with that authority, FMCSA has promulgated regulations under 49 CFR part 385, subpart E, to address the congressional

mandate on hazardous materials safety permits. Those regulations are the underlying provisions to which the material incorporated by reference discussed in this final rule is applicable.

#### **IV. BACKGROUND**

In 1986, the U.S. Department of Energy and CVSA entered into a cooperative agreement to develop a higher level of inspection procedures, out-of-service (OOS) conditions and/or criteria, an inspection decal, and a training and certification program for inspectors to conduct inspections of shipments of transuranic waste and highway route controlled quantities of radioactive material. CVSA developed the North American Standard Level VI Inspection Program for Transuranic Waste and Highway Route Controlled Quantities of Radioactive Material. This inspection program for select radiological shipments includes inspection procedures, enhancements to the North American Standard Level I Inspection, radiological surveys, CVSA Level VI decal requirements, and the “North American Standard Out-of-Service Criteria and Level VI Inspection Procedures and Out-of-Service Criteria for Commercial Highway Vehicles Transporting Transuranics and Highway Route Controlled Quantities of Radioactive Materials as defined in 49 CFR Part 173.403.” As of January 1, 2005, all vehicles and carriers transporting highway route controlled quantities of radioactive material are regulated by the U.S. Department of Transportation. All highway route controlled quantities of radioactive material must pass the North American Standard Level VI Inspection prior to the shipment being allowed to travel in the United States. All highway route controlled quantities of radioactive material shipments entering the United States must also pass the North American Standard Level VI Inspection either at the shipment’s point of origin or when the shipment enters the United States.

Section 385.415 of title 49, Code of Federal Regulations, prescribes operational requirements for motor carriers transporting hazardous materials for which a hazardous

materials safety permit is required. Section 385.415(b) requires that motor carriers ensure a pre-trip inspection is performed on each motor vehicle to be used to transport a highway route controlled quantity of a Class 7 (radioactive) material, in accordance with the requirements of CVSA's handbook titled "North American Standard Out-of-Service Criteria and Level VI Inspection Procedures and Out-of-Service Criteria for Commercial Highway Vehicles Transporting Transuranics and Highway Route Controlled Quantities of Radioactive Materials as defined in 49 CFR Part 173.403."

According to 2015-2019 data from FMCSA's Motor Carrier Management Information System (MCMIS), approximately 3.34 million Level I – Level VI inspections were performed annually. Nearly 97 percent of these were Level I,<sup>1</sup> Level II,<sup>2</sup> and Level III<sup>3</sup> inspections. During the same period, an average of 611 Level VI inspections were performed annually, comprising only 0.02 percent of all inspections. On average, OOS violations were cited in only 7.8 Level VI inspections annually (2 percent), whereas on average, OOS violations were cited in 266,025 Level I inspections (25 percent), 275,840 Level II inspections (23 percent), and 61,201 Level III inspections (6 percent) annually. As these statistics demonstrate, OOS violations are cited in a far lower percentage of Level VI inspections than Level I, II, and III inspections, due largely to the enhanced oversight and inspection of vehicles involved in Level VI inspections because of the sensitive nature of the cargo being transported.

The changes from the 2019 edition of the CVSA handbook to the 2021 edition, which includes changes adopted in the 2020 edition, are intended to ensure clarity in the presentation of the OOS conditions and are generally editorial or ministerial. As

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<sup>1</sup> Level I is a 37-step inspection procedure that involves examination of the motor carrier's and driver's credentials, record of duty status, the mechanical condition of the vehicle, and any hazardous materials/dangerous goods that may be present.

<sup>2</sup> Level II is a driver and walk-around vehicle inspection, involving the inspection of items that can be checked without physically getting under the vehicle.

<sup>3</sup> Level III is a driver-only inspection that includes examination of the driver's credentials and documents.

discussed below, FMCSA does not expect the changes made in the 2021 edition of the CVSA handbook to affect the number of OOS violations cited during Level VI inspections.

## **V. DISCUSSION OF PROPOSED RULEMAKING AND COMMENTS**

### **A. Proposed Rulemaking**

FMCSA published a notice of proposed rulemaking (NPRM) on July 6, 2021 (86 FR 35443). Whereas the incorporation by reference found at 49 CFR 385.4 and referenced at 49 CFR 385.415(b) references the April 1, 2019, edition of CVSA's "North American Standard Out-of-Service Criteria and Level VI Inspection Procedures and Out-of-Service Criteria for Commercial Highway Vehicles Transporting Transuranics and Highway Route Controlled Quantities of Radioactive Materials as defined in 49 CFR part 173.403," the NPRM proposed to incorporate by reference the April 1, 2021, edition, which also captures changes adopted in the April 1, 2020, edition. Cumulatively, twenty-one updates distinguish the April 1, 2021, edition from the 2019 edition. Each of the changes was described and discussed in detail in the NPRM. Generally, the changes serve to clarify or provide additional guidance to inspectors regarding uniform implementation and application of the out-of-service criteria, and none is expected to affect the number of out-of-service violations cited during Level VI inspections. The incorporation by reference of the 2021 edition does not change what constitutes a violation of FMCSA regulations.

### **B. Comments and Responses**

FMCSA solicited comments concerning the NPRM for 30 days ending August 5, 2021. By that date, three comments were received, from CVSA and two private citizens.

CVSA commended FMCSA for publishing the NPRM, and encouraged FMCSA to finalize the rule and update the incorporation by reference because "the current reference of the April 1, 2019 edition is outdated and does not reflect the most up to date

Standard, which was published on April 1, 2021.”

One comment from a private citizen was outside the scope of this rulemaking.

One comment from a private citizen recommended that FMCSA not include the date of the handbook in the regulations so that updating the date through rulemakings would not be necessary.

Response: FMCSA must specify which version of a document is being incorporated by reference under the requirements of 1 CFR part 51. Therefore, in order to ensure that the most recent version of the handbook is incorporated by reference at 49 CFR 385.415(b), FMCSA must publish a new rulemaking for each updated version.

## **VI. INTERNATIONAL IMPACTS**

The Federal Motor Carrier Safety Regulations (FMCSRs), and any exceptions to the FMCSRs, apply only within the United States (and, in some cases, United States territories). Motor carriers and drivers are subject to the laws and regulations of the countries in which they operate, unless an international agreement states otherwise. Drivers and carriers should be aware of the regulatory differences among nations.

The CVSA is an organization representing Federal, State, and Provincial motor carrier safety enforcement agencies in the United States, Canada, and Mexico. The OOSC provide uniform enforcement tolerances for inspections conducted in all three countries.

## **VII. SECTION-BY-SECTION ANALYSIS**

### ***Section 385.4 Matter incorporated by reference***

Section 385.4(b)(1), is amended by replacing the reference to the April 1, 2019, edition date with a reference to the new edition date of April 1, 2021.

## **VIII. REGULATORY ANALYSES**

### **A. Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), and DOT Regulations**

FMCSA has considered the impact of this final rule under E.O. 12866 (58 FR 51735, Oct. 4, 1993), Regulatory Planning and Review, E.O. 13563 (76 FR 3821, Jan. 21, 2011), Improving Regulation and Regulatory Review, and DOT's regulatory policies and procedures. The Office of Information and Regulatory Affairs (OIRA) determined that this final rule is not a significant regulatory action under section 3(f) of E.O. 12866, as supplemented by E.O. 13563, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. Accordingly, the Office of Management and Budget (OMB) has not reviewed it under these orders.

The final rule updates an incorporation by reference from the April 1, 2019, edition to the April 1, 2021, edition of CVSA's handbook titled "North American Standard Out-of-Service Criteria and Level VI Inspection Procedures and Out-of-Service Criteria for Commercial Highway Vehicles Transporting Transuranics and Highway Route Controlled Quantities of Radioactive Materials as defined in 49 CFR Part 173.403." FMCSA reviewed its MCMIS data on inspections performed from 2015 to 2019 and does not expect the handbook updates to have any effect on the number of OOS violations cited during Level VI inspections. Therefore, the final rule's impact would be de minimis.

### **B. Congressional Review Act**

Pursuant to the Congressional Review Act (5 U.S.C. 801, et seq.), OIRA designated this rulemaking as not a "major rule," as defined by 5 U.S.C. 804(2).<sup>4</sup>

### **C. Regulatory Flexibility Act (Small Entities)**

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<sup>4</sup> A "major rule" means any rule that the Administrator of OIRA at OMB finds has resulted in or is likely to result in (a) an annual effect on the economy of \$100 million or more; (b) a major



The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121, 110 Stat. 857), requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. The term “small entities” comprises small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000 (5 U.S.C. 601(6)). Accordingly, DOT policy requires an analysis of the impact of all regulations on small entities, and mandates that agencies strive to lessen any adverse effects on these businesses. None of the updates from the 2021 edition imposes new requirements or makes substantive changes to the FMCSRs.

When an Agency issues a rulemaking proposal, the RFA requires the Agency to “prepare and make available an initial regulatory flexibility analysis” that will describe the impact of the proposed rule on small entities (5 U.S.C. 603(a)). Section 605 of the RFA allows an agency to certify a rule, instead of preparing an analysis, if the final rule is not expected to impact a substantial number of small entities. This final rule updates an incorporation by reference found at 49 CFR 385.4(b)(1) and referenced at 49 CFR 385.415(b), and incorporates by reference the April 1, 2021, edition of the CVSA handbook. The changes to the 2021 edition of the CVSA handbook from the 2019 edition are intended to ensure clarity in the presentation of the OOS conditions and are generally editorial or ministerial. As noted above, FMCSA does not expect the changes made in the 2021 edition of the CVSA handbook to affect the number of OOS violations cited during

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increase in costs or prices for consumers, individual industries, Federal agencies, State agencies, local government agencies, or geographic regions; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets (5 U.S.C. 804(2)).

Level VI inspections. Accordingly, I certify that this final rule will not have a significant economic impact on a substantial number of small entities.

**D. Assistance for Small Entities**

In accordance with section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, FMCSA wants to assist small entities in understanding this rulemaking so they can better evaluate its effects on themselves and participate in the rulemaking initiative. If the rulemaking would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult the person listed under FOR FURTHER INFORMATION CONTACT.

Small businesses may send comments on the actions of Federal employees who enforce or otherwise determine compliance with Federal regulations to the Small Business Administration's Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of FMCSA, call 1-888-REG-FAIR (1-888-734-3247). DOT has a policy regarding the rights of small entities to regulatory enforcement fairness and an explicit policy against retaliation for exercising these rights.

**E. Unfunded Mandates Reform Act of 1995**

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or Tribal government, in the aggregate, or by the private sector of \$170 million (which is the value equivalent of \$100 million in 1995, adjusted for inflation to 2020 levels) or

more in any one year. Though this rulemaking would not result in such an expenditure, the Agency does discuss the effects of this rulemaking elsewhere in this preamble.

**F. Paperwork Reduction Act**

This rulemaking contains no new information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

**G. E.O. 13132 (Federalism)**

A rule has implications for federalism under Section 1(a) of E.O. 13132 if it has “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

FMCSA has determined that this rulemaking does not have substantial direct costs on or for States, nor does it limit the policymaking discretion of States. Nothing in this document preempts any State law or regulation. Therefore, this rulemaking does not have sufficient federalism implications to warrant the preparation of a Federalism Impact Statement.

**H. Privacy**

The Consolidated Appropriations Act, 2005,<sup>5</sup> requires the Agency to conduct a privacy impact assessment (PIA) of a regulation that will affect the privacy of individuals. This rulemaking does not require the collection of personally identifiable information, and therefore a PIA is not necessary.

**I. E.O. 13175 (Indian Tribal Governments)**

This rulemaking does not have Tribal implications under E.O. 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the

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<sup>5</sup> Pub. L. 108-447, 118 Stat. 2809, 3268, 5 U.S.C. 552a note (Dec. 8, 2004).

Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

**J. National Environmental Policy Act of 1969**

FMCSA analyzed this rulemaking for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and determined this action is categorically excluded from further analysis and documentation in an environmental assessment or environmental impact statement under FMCSA Order 5610.1 (69 FR 9680, March 1, 2004), Appendix 2, paragraph 6(b). This Categorical Exclusion (CE) covers minor revisions to regulations. The requirements in this rulemaking are covered by this CE, and the rulemaking does not have any effect on the quality of the environment.

**List of Subjects in 49 CFR 385**

Administrative practice and procedure, Highway safety, Incorporation by reference, Mexico, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

In consideration of the foregoing, FMCSA amends 49 CFR chapter III, part 385, as set forth below:

**PART 385--SAFETY FITNESS PROCEDURES**

1. The authority citation for part 385 continues to read as follows:

**Authority:** 49 U.S.C. 113, 504, 521(b), 5105(d), 5109, 5113, 13901-13905, 13908, 31135, 31136, 31144, 31148, 31151, 31502; sec. 113(a), Pub. L. 103-311, 108 Stat. 1673, 1676; sec. 408, Pub. L. 104-88, 109 Stat. 803, 958; sec. 350, Pub. L. 107-87, 115 Stat. 833, 864; sec. 5205, Pub. L. 114-94, 129 Stat. 1312, 1537; and 49 CFR 1.87.

2. Revise § 385.4(b)(1) to read as follows:

**§ 385.4 Matter incorporated by reference.**

\* \* \* \* \*

(b) \* \* \*

(1) “North American Standard Out-of-Service Criteria and Level VI Inspection Procedures and Out-of-Service Criteria for Commercial Highway Vehicles Transporting

Transuranics and Highway Route Controlled Quantities of Radioactive Materials as defined in 49 CFR Part 173.403,” April 1, 2021, incorporation by reference approved for § 385.415(b).

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Issued under authority delegated in 49 CFR 1.87.

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Meera Joshi,  
Deputy Administrator.

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